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Supreme Court, U.S.
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No. 94-_____

In The

Supreme Court of the United States

October Term, 1994

RON BENSON,

Petitioner,

vs.

THE CITY OF HELENA AND
BRANDT SALO, BUILDING DEPARTMENT

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

BRIEF IN OPPOSITION

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STATEMENT OF LACK OF JURISDICTION

The Petitioner alleges that federal constitutional issues were raised in his original pleading by implication. That is simply not the case. A review of the pleadings show that no federal constitutional issues were raised. A review of the 100+-year old cases cited by Petitioner in support of his position make it clear that federal issues were much more clearly and specifically raised in those cases. A more recent case that addresses the issue of the failure of a party to raise a federal issue is *Illinois v. Gates*, 462 US 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). In that case, the U.S. Supreme Court reiterated its position that:

> "We held early on that Section 25 of the Judiciary Act of 1789 furnished us with no jurisdiction unless a federal question has been both raised and decided in the state court below. As Justice Storey wrote in Crowell v. Randall, 10 Pet. 368, 392 (1836): "If both of these requirements do not appear on the record, the appellate jurisdiction fails." See also *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809)." *Gates, supra*, at 218.

The Petitioner then argues that federal constitutional issues were specifically raised in motions in state District Court. The Motion for Summary Judgment filed by the Petitioner simply asks for judgment based upon the pleadings. It is clear from a review of this document that it raises no federal constitutional issues. Defendants' Motion for Summary Judgment, like-wise, raises no federal constitutional issues.

The Petitioner finally claims that federal constitutional issues were raised again on appeal to the Montana Supreme Court. The appeal was merely from the District Court's decision. The only issues addressed at the district court level were the

motions for summary judgment, based on Petitioner's request for declaratory judgment and the Defendants' Answer and Counterclaim. The Petitioner seems to mistakenly believe that if he says the word "constitution" in an oral argument or puts the words "due process" in brief, that raises federal constitutional issues. In fact, the motion for summary judgment is based on the pleadings and the pleadings frame the issues.

Based on the foregoing, there is no basis for jurisdiction in the United States Supreme Court that arises from the Petitioner's actions at the district court level or at the state supreme court level.

ADDITIONAL CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES NOT REFERRED TO IN BENSON'S PETITION

MONTANA SUPREME COURT INTERNAL OPERATING RULES, SECTION 1, PARAGRAPH 3(c):

> (c) If an appeal presents no constitutional issues and no issues of first impression, does not establish new precedent or modify existing precedent, and would not be of future guidance for citation purposes to the citizens of Montana, the bench, or the bar, the Court may classify that appeal as one for abbreviated opinion. The decision for the case will provide the ultimate disposition without a detailed statement of facts or law. The decision shall not be citeable as precedent and shall be published by its filing as a public document with the Clerk of this Court and by a report of its result to the West Publishing Company for publication as required by § 3-2-603(2), MCA.

STATEMENT OF THE CASE

The Petitioner, Ron Benson, (hereinafter referred to as "Benson"), filed a complaint under the "Uniform Declaratory Judgments Act" set forth in §27-8-101, et seq., Montana Code Annotated. The complaint was filed on February 26, 1991, for the purpose of determining the uses allowed for that property located at 1715 Peosta Street in Helena, Montana. The complaint alleged that Benson was entitled to use the property for certain, specific uses.

The Respondents, the City of Helena and Brandt Salo, the City of Helena's Director of Building and Safety (hereinafter referred to as "City"), filed an answer denying Benson's claimed uses and asked that the district court determine that the business uses of the property be permanently enjoined.

Each party filed a motion for summary judgment and the district court entered its judgment and opinion on March 17, 1993. In that opinion, the district court determined that the previous owners of the property had abandoned the non-conforming prior use of the property (as a bus barn) in 1974. The court further determined that since the non-conforming prior use was abandoned it terminated one (1) year after the date of abandonment. As the district court stated:

> "No facts have been presented to this court which would show anything but that the nonconforming use was abandoned." Petitioner's Appendix A at page A-6.

This decision was appealed to the Montana Supreme Court on April 29, 1993, and was submitted on briefs. The sole issue raised was the appeal from the decision of the district court. The Montana Supreme Court rendered a decision on October 20, 1993, which affirmed the district court decision. Further, the Montana Supreme Court found that the case raised no

constitutional issues and should not be cited as precedent under its Internal Operating Rule 1, paragraph 3(c).

The real facts of this case are that Benson asked the district court to determine the extent and type of uses allowed on his property. The district court did that and the Montana Supreme Court affirmed that determination.

ARGUMENT

THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 3 AND ARTICLE II, SECTION 29 OF THE CONSTITUTION OF THE STATE OF MONTANA DO NOT REQUIRE COMPENSATION FOR THE ALLEGED TAKING OF RON BENSON'S PROPERTY.

Benson incorrectly states in the Argument portion of his Petition that the Fifth Amendment of the United States Constituion and Article I, Section 3 and Article II, Section 29 of the Constitution of the State of Montana require compensation for the taking of Ron Benson's property. He states:

> "The pleadings were **broadened** in Ron Benson's Motion for Summary Judgment to emphasize the taking issue, the required damages, and punitive damages." (Emphasis added) Benson's Petition for Writ of Certiorari, page 12.

The facts and the motions themselves show that the pleadings were not broadened. The fact that Benson may have raised issues in his brief in support of his Motion for Summary Judgment does not change the pleadings.

Benson goes on to state:

> "The District Court declined to address the issues raised in Ron Benson's Motion for Summary Judgment, stating they were not in the original request for Declaratory Judgment." Benson's Petition for Writ of Certiorari, page 12.

That is not true. The district court did address the issues raised in Benson's Motion for Summary Judgment. It did not address the various arguments that were not relevant to his motion that were included in Benson's brief in support of his Motion for Summary Judgment.

Benson states in his Petition that his inclusions by implication and amendment are in accord with Rule 15(b) of the Montana Rules of Civil Procedure. That, too, is incorrect. Rule 15(b) simply states that amendments to pleadings must conform to the evidence and issues upon which there has been a trial. What Rule 15(b) says, in pertinent part, is:

> "When issues not raised by the pleadings are **tried** by express or implied consent of the parties, ..." (emphasis added)

Benson then goes on to argue the "taking issue", even though this was not raised in the district court pleadings nor was it addressed by the Montana Supreme Court. Benson fails to accept the fact that there is a vast difference between a landowner abandoning a non-conforming use as the district court determined Benson did, and a "taking" of property as happened in *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 107b S. Ct. 2378, 96 L.Ed.2d 250 (1986), as well as *Lucas v. South Carolina Coastal Council*, 505 U.S. ____, 112 S. Ct. 2886, 120 L.Ed.2d 798, 60 U.S.L.W. 4843 (1992).

Benson continually argues here that there has been a "taking"

or that his property has been made valueless, despite the fact that those issues were never framed, pled or raised at the district court level, nor has any evidence ever been presented to support his position.

The case of *Bateson v. Geisse*, 857 F.2d 1300, 1306 (9th Cir. 1988), as cited by Benson, clearly supports the City's position.

> "To state a procedural due process claim, Bateson must establish that he had a protectible property interest in his proposed minor plat application and, if so, that he was denied this property right without the process which was due under the circumstances." *Bateson, supra*, at 1305.

Obviously, there was procedural due process in the case at hand because Benson had the opportunity to present whatever issues he wanted to the district court when he filed his motion for declaratory judgment. The district court ruled on the pleadings as they were framed by the parties.

Further, *Bateson* makes it clear that there is no inverse condemnation claim. The 9th Circuit agreed that if there was a provision under Montana law for a claim under inverse condemnation then Bateson had to raise that claim under that provision.

> "Thus, Bateson appears to have an adequate state compensation remedy which he must pursue before he can state a taking claim. "Until the state courts establish that [Bateson] may not obtain just compensation through an inverse condemnation action under any circumstances, [Montana] procedures are adequate within the terms of *Williamson County* and [Bateson's] failure to use them

> cannot be excused." *Austin v. City and County of Honolulu*, 840 F.2d 678, 681 (9th Cir. 1988)." Bateson, supra, at 1306.

Based on the foregoing, it is clear that there has been no violation of the Constitution of the State of Montana and no violation of the Constitution of the United States because there was no taking. Neither the District Court nor the Montana Supreme Court was presented with or addressed Benson's claims regarding a taking.

RON BENSON WAS TREATED IN A MANNER EQUAL TO ALL OTHERS WITH REGARD TO HIS RIGHTS TO HIS PROPERTY IN ACCORD WITH THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF THE STATE OF MONTANA.

In addition to his Fifth Amendment argument, Benson has now raised a Fourteenth Amendment claim. He appears to base his equal protection argument on the fact that the Montana Supreme Court, under its internal operating rules, indicated that this case should not be used as precedent.

The fact that the Montana Supreme Court does not consider this case of any precedential value merely means that the case is 100% fact-driven; it does not mean that Benson has been singled out in any fashion. Benson cited no case where, under the same fact situation, he was treated any differently than anyone else. His reference to *American Sugan Refining Co. v. Louisiana*, 179 U.S. 89, 45 L.Ed. 102, 21 S.Ct. 43 (1900), is inappropriate because in that case the court said that the Fourteenth Amendment allegation as set forth in the pleading in the lower court at least raised the issue and, together with the facts, made the petitioner's claim at least plausible on its face. In the case at hand, there was no issue of a Fourteenth Amendment claim raised by Benson anywhere in his pleadings and the fact situation clearly shows that his argument is totally implausible.

RON BENSON RECEIVED DUE PROCESS IN ACCORDANCE WITH THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF THE STATE OF MONTANA.

Benson takes the position that he is entitled to due process before the City takes his property. As has been previously stated, there was no "taking" of Benson's property, there was merely a judicial determination of the abandonment of a non-conforming use.

Most important, there certainly was due process. Benson had an opportunity to present any argument he wanted to present to the district court. In fact, he filed the initial pleadings to present this matter to the district court. It is ludicrous for Benson to later argue that he was not accorded due process when he was the one who initiated the procedure to get a judicial determination.

Benson's argument that *Watts v. City of Helena*, 151 Mont. 138, 439 P.2d 767 (1968) in any way supports his position is in error. The facts in the *Watts* case involved the extension or expansion of a non-conforming use. In that case, the Montana Supreme Court indicated there was no requirement for an appeal of the ruling made by the Board of Adjustment because there was no requirement to go before the Board of Adjustment in the first place. The landowners were allowed by the ordinance in place at the time to expand the non-conforming use to the entire property. The Montana Supreme Court goes on to cite a California case in that regard. It was not the Montana Supreme Court that made the statement as alleged by Benson in his petition; it was a quote from a California case that was incorporated in the Montana Supreme Court decision. That is clearly not the same thing. The correct Montana Supreme Court quote was:

> "'No vested right is affected by either the denial * * * or the grant * * * of a zoning ordinance.' *Flagstad v. City of San Mateo*,

> 156 Cal.Ap.2d 138, 318 P.2d 825 (1957)."
> *Watts, supra,* at 769.

It is important to note that Benson's misquote in his Petition is a reference to another case in another state on another issue based upon an ordinance different than the ordinance in the case at hand. There is no granting of or denial of a zoning variance by the Board of Adjustment in this case nor was one ever requested. The citation misquoted by Benson regards an entirely different issue and is meaningless here.

Finally, Benson states on page 20 of his Petition:

> ". . . In all of the record, the City of Helena never alleged or offered any proof that the non-conforming use ceased for more than one year. Not is it contained in the District Court findings of fact or conclusions of law. Nor has this issue ever been heard."

That position is absurd. What the district court stated was:

> "The property ceased being used as a bus barn in 1974. Thus, under the Helena zoning ordinances and its discontinuance-time limitation, the exempted use terminated after a year of not having been exercised." Memorandum and Order dated March 17, 1993, Lewis and Clark County, Montana First Judicial District Court. Petitioner's Appendix A at A-5.

The district court determined, based on the affidavits and pleadings presented by the parties, that there was an abandonment of the exempted usage. The Montana Supreme Court agreed with that position.

CONCLUSION

In summary, this Court should not grant a writ of certiorari in this case for several reasons. First and foremost, this Court has no jurisdiction. Federal constitutional issues were not raised or addressed in the courts below. Second, this case is of absolutely no importance to anyone except the parties involved. Even the Montana Supreme Court recognized that this case is so uniquely fact-oriented that it has no precedential value. Third, Benson's arguments, misquotes and misstatements of the facts below make it clear that there are no issues of due process because Benson had every opportunity to be heard at the district court level on any issue he chose to properly raise. Fourth, there are no issues of violation of Fifth Amendment rights entitling Benson to compensation because he failed to raise those issues at all and he failed to plead an inverse condemnation claim. Fifth, there is no Fourteenth Amendment violation because there isn't even an argument that Benson was treated differently than anyone else under the facts and circumstances presented.

There was no "taking" by the City. There was an abandonment of a non-conforming use by Benson. There is no violation of due process. Benson instituted a district court action wherein he had the opportunity to raise any issues he wanted to raise.

The petition should be dismissed.

Respectfully submitted this 17th day of February, 1994

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